

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33570

VINCENT CRAIG OLSEN,	)	2008 Unpublished Opinion No. 723
	)	
Petitioner-Appellant,	)	Filed: December 2, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Vincent Craig Olsen, Littlefield, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Vincent Craig Olsen appeals from the district court's order dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Olsen was originally charged with second degree murder and pled guilty to voluntary manslaughter, I.C. § 18-4006, with an enhancement for use of a firearm in the commission of a felony, I.C. § 19-2520. The district court sentenced Olsen to a unified term of twenty-five years, with a minimum period of confinement of ten years. Olsen filed an application for post-conviction relief, which was later amended, alleging, among various other claims, ten claims of ineffective assistance of trial counsel. The state responded and filed a motion to dismiss Olsen's application. On May 3, 2006, the district court summarily dismissed all but three of Olsen's claims: that counsel failed to advise him of the elements of the offense charged against him and of justifiable and excusable homicide; that counsel failed to file a motion to withdraw Olsen's

guilty plea when he requested; and that counsel failed to file a direct appeal upon Olsen's request. An evidentiary hearing was held on Olsen's remaining claims. On October 13, 2006, the district court entered an order granting partial relief on Olsen's claim that counsel failed to file a direct appeal from the denial of his I.C.R. 35 motion, but denying relief on his remaining claims. Olsen appeals.

## II.

### STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she

would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

### **III. ANALYSIS**

#### **A. Summarily Dismissed Claims**

Of the seven claims of ineffective assistance of trial counsel that were summarily dismissed, Olsen alleges that the district court erred in dismissing three of them: trial counsel failed to file a motion for change of venue in light of pretrial publicity; trial counsel failed to adequately consult with Olsen regarding his case and prepare him for trial; and trial counsel failed to fully advise Olsen of the potential penalties he could receive if he pled guilty to voluntary manslaughter.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions,

and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

**1. Failure to file a motion for change of venue**

In his application for post-conviction relief, Olsen alleged that he could not have received a fair trial in the county where his trial was to take place because of unfavorable pretrial publicity. He contended that the fear of an unfair trial led him to involuntarily plead guilty to the reduced charge. The district court summarily dismissed this claim, concluding that Olsen had failed to provide any evidence of prevailing professional norms regarding requests for change of venue by which to evaluate his counsel's performance. Furthermore, the district court reviewed the numerous newspaper clippings provided by Olsen and held that any request would have been denied because there was insufficient publicity to warrant such a change.

Whether a change of venue should be requested is a matter of trial strategy and tactical choice, not subject to review as a claim of ineffective assistance of counsel in the absence of proof of inadequate preparation or ignorance on counsel's part. *State v. Fee*, 124 Idaho 170, 175, 857 P.2d 649, 654 (Ct. App. 1993). In *Fee*, this Court held there was no ineffective assistance of counsel where counsel failed to request a change of venue in the absence of any evidence in the record to establish a basis for the request. *Id.* The Idaho Supreme Court has also refused to second-guess trial counsel's failure to request a change of venue as a matter of trial strategy when counsel determined that it had little probability of success. *State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 147 (1997). In *Bjorklund v. State*, 130 Idaho 373, 941 P.2d 345 (Ct. App. 1997), this Court denied a similar claim based on trial counsel's failure to request a change of venue due to extensive pretrial publicity. This Court held that there was no right to relief because the petitioner in that case had pled guilty to the crime and the publicity could only have affected his representation had the matter gone to trial. *Id.* at 377, 941 P.2d at 349.

In support of his claim in this case, Olsen provided newspaper clippings and internet news stories showing that there was media coverage of his crime and various procedural matters pertaining to his case. Olsen's trial counsel provided an affidavit wherein he averred that he believed that there was insufficient publicity to warrant a change in venue. We will not second-guess trial counsel's tactical decisions and trial strategy. The district court did not err in

summarily dismissing Olsen's claim that trial counsel provided ineffective assistance by failing to request a change in venue.

**2. Failure to adequately consult with Olsen regarding his case**

Olsen contends that the district court erred in summarily dismissing his claim of ineffective assistance of trial counsel for failure to adequately consult with him regarding his case and to prepare him for trial. He alleges that he did not receive proper notice of the potential summary dismissal of his claim. Additionally, Olsen alleges that material issues of fact exist and that the district court, therefore, erred in summarily dismissing the claim.

Idaho Code Section 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admission and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

If the state files and serves a properly supported motion to dismiss pursuant to I.C. § 19-4906(c), further notice from the court is ordinarily unnecessary. *Franck-Teel v. State*, 143 Idaho 664, 669, 152 P.3d 25, 29 (Ct. App. 2006). However, if the state's motion fails to give notice of the grounds, the court may grant summary dismissal only if the court first gives the applicant twenty days' notice of intent to dismiss and the grounds therefore pursuant to I.C. § 19-4906(b).<sup>1</sup> *Franck-Teel*, 143 Idaho at 669, 152 P.3d at 29. This procedure is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact. *Id.*

A motion for summary dismissal that does not identify the particular basis for dismissal of the applicant's claims fails to give notice of any deficiencies in the evidence or additional legal analysis necessary to avoid dismissal of the action. *Id.* In such a situation, the court's summary dismissal of the application is, in effect, a sua sponte dismissal on grounds advanced by the court, and it is obliged to comply with the twenty-day notice requirement in I.C. § 19-

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<sup>1</sup> Idaho Code Section 19-4906(b) provides, in pertinent part:

When a court is satisfied . . . that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal.

4906(b) before dismissing the post-conviction action. *Franck-Teel*, 143 Idaho at 669, 152 P.3d at 29. Failure to provide sufficient notice ordinarily requires that an order summarily dismissing an application for post-conviction relief be reversed. *Peltier v. State*, 119 Idaho 454, 456-57, 808 P.2d 373, 375-76 (1991).

On September 6, 2005, following Olsen's amended petition for post-conviction relief and affidavit in support, the state filed a motion to dismiss. Regarding Olsen's claim of ineffective assistance of counsel for failure to adequately consult with him and to prepare him for trial, the state responded:

This is . . . contrary to what [Olsen] told the Court during his plea. . . . [Olsen] told the Court that he was satisfied with his lawyers. Additionally, [Olsen] has not pointed to any material matter that trial counsel did not consult with him concerning. [Trial Counsel's] affidavit shows that he had the time available to him that he needed.

The state made a specific response that Olsen's claim that he felt his counsel was unprepared and failed to consult with him was contrary to his statement at his change of plea hearing that he was satisfied with counsel's performance. Additionally, the state indicated that he had failed to address any specific instances of deficient performance by counsel to corroborate his allegations. Olsen now claims that this gave insufficient notice as to any deficiencies in the evidence or additional necessary legal analysis. However, on December 19, 2005, Olsen filed a second affidavit and a brief in support of his amended petition. The second affidavit and brief in support provided some specific instances where he felt that counsel had failed to adequately prepare for trial and failed to effectively consult with him. Olsen's subsequent filings demonstrate that he had sufficient notice of the evidentiary and analytical deficiencies of his claim based on the state's motion for summary dismissal. Therefore, the district court was not required to provide him with notice of intent to summarily dismiss his claim and the twenty-day opportunity to respond.

Next we consider Olsen's contention that the district court erred in summarily dismissing this claim because material issues of fact existed. The affidavits provided by Olsen to the district court attempted to provide a basis for his claim. They contained allegations that trial counsel was simultaneously representing another client in a high-profile case which caused counsel to be unprepared in Olsen's case, that counsel had failed to interview witnesses, and that counsel had failed to investigate false statements by a witness. The district court held that there was no

constitutional requirement that defense counsel only represent one client at a time, that Olsen had failed to show deficient performance or prejudicial effect from any failure to interview witnesses, and that Olsen had failed to raise any specific allegations of deficient performance by counsel in investigating potentially false witness statements.

Olsen provided no evidence to the district court, other than his conclusory allegation, that trial counsel was unprepared in Olsen's case because counsel was simultaneously representing another high-profile client. Thus, Olsen has failed to meet his burden of raising a genuine issue of material fact regarding this allegation and the district court properly summarily dismissed it. Regarding Olsen's claim that trial counsel had failed to interview witnesses, Olsen's affidavits provided names of individuals who Olsen believed were witnesses to the crime and averred he requested his trial counsel to interview them, which did not happen. Trial counsel's affidavit said that he either did not know who these potential witnesses were and had no reason to believe that they had relevant information or that he attempted to interview them but either could not contact them or could not retrieve information from them. Olsen failed to provide any admissible evidence that these witnesses had relevant evidence, that counsel could have located them, or that counsel had been deficient in attempting to extract information from them. Furthermore, Olsen failed to provide any evidence tending to show that he had suffered prejudice even if counsel's performance was deficient. Therefore, Olsen failed to meet his burden of proof regarding this allegation and it was also properly summarily dismissed.

Lastly, regarding Olsen's final allegation that trial counsel failed to investigate false statements by witnesses, the evidence shows that, at the time of Olsen's plea, two key facts were unknown to the defense--one witness had lied at the grand jury proceeding and that the witness conspired with another witness to conceal the fact about which he lied. Olsen alleges that if trial counsel would have reinterviewed these witnesses regarding discrepancies between statements made to police and grand jury testimony, as Olsen requested, trial counsel would have learned of the false statements before Olsen pled guilty. Defense attorneys do not have a duty to interview or, in this case, to reinterview all potential witnesses. *State v. Bingham*, 116 Idaho 415, 424, 776 P.2d 424, 433 (1989); *Milburn v. State*, 130 Idaho 649, 654, 946 P.2d 71, 76 (Ct. App. 1997). Imposing such a mandatory duty "would needlessly restrict their judgment as to which witnesses should be interviewed and when." *Bingham*, 116 Idaho at 424, 776 P.2d at 433. However, under some circumstances such a failure can constitute a deficiency in representation, and each case

must be judged according to the significance of the evidence the witness has to offer and what other sources are available to ascertain the testimony of the witness. *Milburn*, 130 Idaho at 654, 946 P.2d at 76.

The record shows that trial counsel interviewed one of the witnesses after the grand jury proceedings and the witness lied. The record is silent as to whether trial counsel interviewed the other witness. However, as the district court held, “it is improbable that a person who willfully lied to police officers and perjured himself before a grand jury with the goal of concealing negative information about the decedent would voluntarily admit such conduct to the defense team.” The district court found that Olsen had failed to specifically allege how trial counsel’s performance was deficient. We conclude that, under the facts of this case, Olsen’s trial counsel was not ineffective for failing to reinterview the witnesses. At least one had lied in a previous interview, and Olsen claimed that he knew they were lying. Thus, reinterviewing these witnesses in order to ascertain that they were lying would not foreseeably produce significant new evidence for the defense. Therefore, the district court did not err in summarily dismissing this allegation.

### **3. Failure to advise Olsen of the penalties for voluntary manslaughter**

Olsen next contends that the district court erred in summarily dismissing his claim of ineffective assistance of counsel that counsel failed to accurately advise him of the potential penalties of voluntary manslaughter. Olsen’s affidavits alleged that trial counsel had misinformed him that the most severe sentence he would receive for pleading guilty to voluntary manslaughter would most likely be less than seven years determinate. Affidavits from trial counsel did not provide any evidence to rebut Olsen’s contention that he was not fully advised of the consequences of pleading guilty. Thus, the district court held that trial counsel’s performance was deficient. However, the district court held that Olsen was not prejudiced by trial counsel’s deficiency because Olsen was fully advised of the consequences of pleading guilty at his change of plea hearing.

Olsen does not dispute that he was fully advised of the potential maximum period of incarceration at his change of plea hearing. He claims, however, that he was not fully advised of all the potential consequences of a guilty plea because the district court failed to advise him of the possibility of restitution. Olsen’s claim is belied by the record. At the change of plea hearing, the district court addressed restitution and the following exchange took place:



THE COURT: Is there anything about restitution for the victim or the victim's family in this matter? Was that part of the negotiations, or is that something that is going to be left open?  
[TRIAL COUNSEL]: We haven't discussed that, Judge.  
[PROSECUTOR]: Judge, I think, by statute, that may become part of the proposed sentence--or the recommended sentence, I mean. But that's not part of what we have discussed.  
THE COURT: Do you agree that those are the terms of the plea bargain as outlined?  
[PROSECUTOR]: Yes, sir.  
THE COURT: Mr. Olsen, is that your understanding of the plea bargain?  
[OLSEN]: Yes, Your Honor.

It is clear from this exchange that the district court addressed the prospect of restitution with the parties, and the prosecutor said that restitution was not something discussed as part of the plea agreement but acknowledged that restitution may become part of the proposed sentence. At that point, Olsen acknowledged that was his understanding of the agreement as well. The district court then went on to apprise Olsen of the potential maximum period of incarceration for the crime for which he would plead guilty, which Olsen also acknowledged that he understood. Because Olsen was fully advised of the potential consequences of his guilty plea to voluntary manslaughter, he did not suffer prejudice from trial counsel's alleged failure to fully advise him. Therefore, the district court did not err in summarily dismissing this claim of ineffective assistance of counsel.

## **B. Claims Denied After Hearing**

The district court held an evidentiary hearing on three of Olsen's claims of ineffective assistance of trial counsel: counsel failed to advise Olsen of the elements of the offense charged against him and of justifiable and excusable homicide; counsel failed to file a motion to withdraw Olsen's guilty plea when he requested; and counsel failed to file a direct appeal upon Olsen's request. After the hearing, the district court granted Olsen partial relief holding that trial counsel was ineffective for failing to file a direct appeal from the denial of Olsen's Rule 35 motion, but denied all other relief. Olsen contends that the district court erred in denying his claims, including partially denying relief on his claim that counsel was ineffective for failing to file a direct appeal.

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865,

801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

**1. Failure to advise of the elements of the offense and applicable defenses**

Olsen contends that trial counsel was ineffective for failing to properly inform him of the elements necessary to prove the crime he was charged with and applicable defenses. Olsen does not argue the merits of this claim on appeal. Rather, he challenges the language of the district court's order dismissing his claim after a hearing and argues that it is contradictory and that, therefore, he is entitled to another hearing on the matter. The language from the district court's order that Olsen contends is contradictory finds:

The Court accepts the truth of [Olsen's] assertion that he would not have entered a plea of guilty to the charges if he had understood the elements of voluntary manslaughter. All the evidence presented in the trial of this post-conviction relief leaves the Court with the abiding impression that [Olsen] would not have permitted matters to proceed if he felt any reservation as to his understanding of proceedings. However, as previously stated, the Court finds that trial counsel had repeatedly explained the elements of voluntary manslaughter to [Olsen].

Olsen argues that, by this language, the district court acknowledged that Olsen would not have pled guilty if he understood the elements of the crime, while at the same time stating that he understood the elements of the crime. Therefore, according to Olsen, the district court should have found that his plea was unknowing and involuntary. The state argues that any contradiction is the result of a mistaken omission and that the disputed language should read: "The Court accepts the truth of Petitioner's assertion that he would not have entered a plea of guilty to the charges if he had *not* understood the elements of voluntary manslaughter." We do not need to engage in this hair-splitting line of analysis.

In the district court's conclusions of law regarding this claim, it held that Olsen had the burden of proving that trial counsel had failed to inform him of the elements of the offense and

that there was a reasonable probability that, but for counsel's errors, he would not have pled guilty. The district court then held:

As discussed in this Court's Findings of Fact, the Court finds that trial counsel did, in fact, inform [Olsen] of the elements of voluntary manslaughter. [Olsen] understood the requirements of law for conviction of that offense. His plea of guilty was not based upon ignorance or incomprehension. For this reason, the Court concludes that [Olsen] has failed to carry his burden of proof as to this claim of ineffective assistance of counsel.

The district court likewise held that Olsen had failed to meet his burden of proof regarding trial counsel's failure to explain the elements of potential defenses. There was no evidence that any of the defenses were likely to have succeeded at trial beyond a statement by trial counsel to Olsen that he had a ten percent chance of acquittal based on a combination of the defenses self-defense and accident. Trial counsel provided this assessment based on an email request by Olsen indicating that he was engaging in a risk analysis of potential trial outcomes. Olsen presented no evidence, other than his recollection against trial counsel's, that he did not understand the required elements of a voluntary manslaughter or the applicable defenses. Therefore, Olsen failed to meet his burden of proof and the district court did not err in dismissing this claim.

## **2. Failure to file a motion to withdraw guilty plea when requested**

Olsen next contends that the district court erred in denying his claim that trial counsel was ineffective for failing to file a motion to withdraw his guilty plea after he allegedly requested that counsel do so. At the evidentiary hearing, Olsen testified that he requested trial counsel to withdraw his guilty plea after learning of the inaccuracies in several witnesses' testimonies. Olsen's trial counsel testified that he and co-counsel met with Olsen after learning of the false testimony and advised him as to the effect that this discovery could have to "negate" the indictment. Trial counsel testified that he would have filed a motion had Olsen requested it. Co-counsel also testified that he was never instructed to move to withdraw the plea and that, if he was asked to do so, he would have counseled against it but done so anyway. Olsen provided no notes or other documentation that he made such a request. Based on the conflicting testimony, the district court found that, while a motion to withdraw his guilty plea was likely to have succeeded, Olsen never requested that counsel file such a motion. Based on our review of the record, we conclude that Olsen failed to meet his evidentiary burden of proving that he requested that trial counsel file a motion to withdraw his guilty plea.

Olsen does not challenge the district court's finding that he never made such a request. Instead, he argues that the district court erred by not holding that counsel should have, nevertheless, filed a motion to withdraw even absent a request from Olsen. Furthermore, he contends that the district court erred by not holding that trial counsel failed to advise him of the possibility of such a motion. Neither of these arguments are contained in Olsen's post-conviction claim that counsel was ineffective for failing to withdraw his guilty plea when he so instructed. Therefore, we need not address them further.

### **3. Failure to file a direct appeal when requested**

Lastly, Olsen contends that the district court erred in dismissing his claim of ineffective assistance of trial counsel for failing to file a direct appeal upon his request. After the evidentiary hearing on this claim, the district court held that Olsen had met his burden of proof regarding trial counsel's failure to file an appeal of the denial of his Rule 35 motion for reconsideration. However, the district court held that Olsen had failed to meet his burden of proving that trial counsel was ineffective for failing to file a direct appeal of the judgment of conviction because it found that trial counsel consulted with Olsen regarding his rights of appeal and that, thereafter, Olsen did not make a request to file a direct appeal.

An attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). On the other hand, a defendant who explicitly instructs counsel not to file an appeal cannot later complain that, by following the defendant's instructions, counsel performed deficiently. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Where the defendant has not conveyed his or her intent with respect to an appeal either way, the court must first determine whether trial counsel consulted with the defendant about an appeal. *Id.* at 478; *Pecone v. State*, 135 Idaho 865, 868, 26 P.3d 48, 51 (Ct. App. 2001). In this context, the term "consult" means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. *Flores-Ortega*, 528 U.S. at 478. If counsel has consulted with the defendant, then counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with regard to an appeal. *Id.*

If counsel has not consulted with the defendant, then counsel's performance in failing to consult with the defendant is itself deficient if a rational defendant would want to appeal or the

particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. *Id.* at 480. In making these determinations, courts must take into account all the information counsel knew or should have known. *Id.*

Once counsel's performance has been shown to be deficient, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that, but for counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed. *Id.* at 484. In ascertaining whether a defendant has made the requisite showing of prejudice, courts may consider whether there is evidence of nonfrivolous grounds for appeal or the defendant in question promptly expressed a desire to appeal. *Id.* at 485.

As with many of his other claims, Olsen failed to present any evidence, other than his bare allegations, to support his claim that counsel failed to advise him of his rights to appeal or that Olsen requested counsel to file a direct appeal from his judgment of conviction. Based on conflicting testimony, the district court did not find Olsen's version of the events to be credible. The district court concluded:

It is fair to say that the Court perceives [Olsen's] expression of dissatisfaction with trial counsel as reflecting his dissatisfaction with the outcome of his case rather than deficiencies in trial counsel's performance. Proceeding on the premise that [Olsen] has not willfully perjured himself in these proceedings, the Court perceives that his account of trial counsel's representation is plagued by the "distorting effects of hindsight" which potentially color every claim of ineffective assistance of counsel. *See, e.g., State v. Manley*, 142 Idaho 338, 345, 127 P.3d 954, 961 (2005). The Court is left with the abiding impression that [Olsen] now recognizes at a visceral level that which he previous[ly] recognized only at the intellectual level: the enormous impact of a lengthy prison sentence on his life. Stated differently, now that he is experiencing the result of his decision to plead guilty, rather than contemplating the potential consequences of the plea, [Olsen] would prefer to "roll the dice" in a trial as he would have a chance, however slight, to avoid serving a lengthy term of imprisonment. His recollection of trial counsel's representation serves that desire.

The conclusion of the district court is supported by substantial evidence. Other than Olsen's allegation that counsel did not advise him and failed to file a direct appeal, the record contained trial counsel's testimony that he did advise Olsen of his rights after sentencing and that Olsen made a decision to pursue a Rule 35 motion which, according to counsel, was his best chance of success. During cross-examination of trial counsel at the hearing, he stated:

I remember [Olsen] asking me about whether he should appeal his sentence. And I remember saying, "In my opinion, you have no valid basis for

doing that. I would advise against it. I would advise you to file a Rule 35.” And then [Olsen] concurred in that.

The record also contained a letter which counsel sent to Olsen detailing the relevant time limits for filing a direct appeal, a Rule 35 motion, and a post-conviction relief action. Additionally, there were several pages of trial counsel’s notes of telephone conversations with Olsen and his mother regarding Rule 35 issues that strengthened the perception that this was Olsen’s desired course of action.

Once again, Olsen raises various other arguments on appeal regarding how the district court’s ruling was inconsistent and how the district court misperceived or overlooked relevant facts. We need not further address Olsen’s arguments because his post-conviction claim was that counsel was ineffective for failing to file a direct appeal when requested. The evidence supports the district court’s conclusion that trial counsel consulted with Olsen regarding his rights of appeal and that he never requested that counsel file a direct appeal from his judgment of conviction. Therefore, Olsen has failed to meet his burden of proof and the district court did not err in dismissing this claim.

#### IV. CONCLUSION

Olsen failed to meet his burden of showing a material issue of fact existed as to his post-conviction claims of ineffective assistance of counsel alleging that trial counsel failed to file a motion for change of venue in light of pretrial publicity, trial counsel failed to adequately consult with Olsen regarding his case and prepare him for trial, and trial counsel failed to fully advise Olsen of the potential penalties he could receive if he pled guilty to voluntary manslaughter. Therefore, the district court did not err in summarily dismissing these claims. Olsen has also failed to meet his burden of proving by a preponderance of evidence, his claims that trial counsel was ineffective for failing to advise him of the elements of the offense charged against him and of applicable defenses, failing to file a motion to withdraw Olsen’s guilty plea when he requested, and failing to file a direct appeal upon Olsen’s request. Therefore, the district court did not err in dismissing these claims after an evidentiary hearing. Thus, the district court’s order dismissing Olsen’s application for post-conviction relief is affirmed. No costs or attorney fees are awarded appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**